

This letter responds to an annual survey. See 86 Ill. Adm. Code 130.101. (This is a GIL).

July 13, 1999

Dear Mr. Xxxxx:

This letter is in response to your letter dated May 10, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

The ORGANIZATION, in conjunction with COMPANY, annually undertakes a major information collection effort with respect to the application of the tax laws of the states. ORGANIZATION's goal in gathering this information is to assemble and publish the PUBLICATION. As the market has shown, such a publication is a useful reference source in government, industry, and public accounting.

ORGANIZATION is in the process of updating the PUBLICATION for its annual edition. Accordingly, we ask for your state's assistance in preparing this important publication. Enclosed are your responses to the 1998 questionnaire, the complete 1999 questionnaire and a summary of new and revised questions. (If it would be helpful to you in completing the 1999 questionnaire, we could provide a disk with the entire questionnaire in Microsoft Word for Windows.)

This year, the numbering scheme and the sequence of the questions remains the same. Therefore, you should be able to easily follow the changes from last year to this year.

Please complete the 1999 questionnaire and **return it by July 5, 1999**, in the self-addressed mailer that we included to facilitate your reply. Please return to:

NAME/ADDRESS

The enclosed questionnaire should be answered in accordance with laws in effect as of July 1, 1999. If there is legislation pending which would alter your answers, please explain any such changes of which you are aware at the time the questionnaire is completed.

If you have any questions, please contact me at ####. Thank you for your continued cooperation and support. Your contributions are extremely valuable in maintaining the quality of this outstanding reference work. A complimentary copy of the PUBLICATION will be sent to you when it is published early next year.

SALES AND USE TAXES

Compliance and Administration

Regarding Question 1: The State of Illinois' Retailers' Occupation Tax rate is 6.25%. The Use Tax rate is 6.25%. Retailers in Illinois must collect the Use Tax from their customers by adding the tax to the selling price of the items being sold. See 86 Ill. Adm. Code 150.401, enclosed. It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser that he will assume or absorb the tax. See 86 Ill. Adm. Code 150.515(a), enclosed. Local sales and use taxes have been adopted in the State of Illinois. Please see the enclosed Sales Tax Rate Reference Manual. See 86 Ill. Adm. Code Parts 220, 270, 320, 370.

Regarding Question 2: Whether or not an organization or entity qualifies for exemption from federal income tax under Section 501 of the Internal Revenue code is not determinative as to whether it is exempt from Illinois Sales and Use taxes. Organizations that make application to the Department and are determined to be exclusively religious, educational, or charitable, receive an exemption identification "E" number. See the enclosed copy of 86 Ill. Adm. Code 130.2007. This number evidences that this State recognizes that the organization qualifies as exempt from incurring Use Tax when purchasing tangible personal property in furtherance of its organizational purpose. Organizations that are exempt under federal income tax law are not automatically exempt under Illinois tax law. Sales to a governmental body are generally subject to tax unless the governmental body has an active exemption identification "E" number. See the enclosed copy of 86 Ill. Adm. Code 130.2080. However, Illinois retailers may accept U.S. Government Bank Cards in sales to the U.S. Government and its agencies without requiring an Illinois exemption number. When making a purchase, the holder of the card presents it to the retailer, who records the card number instead of collecting tax. If an organization or governmental body does not have an "E" number, then its purchases are subject to tax. Please be aware that only sales to the organization or governmental body holding the "E" number are exempt, not sales to individual members of the organization. Companies must retain a Certificate of Resale or be provided with an "E" number for a sale to an organization or governmental body to be tax exempt.

Regarding Question 3: For information regarding the taxation of items purchased by a government employee while on government business, please see 86 Ill. Adm. Code 130.2080, 480.101, and 480.105 enclosed.

Regarding Question 4: Taxpayers must file Form ST-1 to report both Retailers' Occupation Tax and Use Tax with the Department of Revenue, Springfield, IL. The Department does accept reproductions of the ST-1 if prior approval is received and the form is computer generated. Taxpayers cannot receive an extension of time to file the return. Taxpayers with multiple locations must file a Multiple Location Schedule form ST-2. See 86 Ill. Adm. Code 130.530. If a taxpayer terminates or ceases to do business a final return

with payment of the tax due and payable is required. See 86 Ill. Adm. Code 130.520.

Generally payment of the tax is due when the return is due. See 86 Ill. Adm. Code 130.535. However, taxpayers with very large average monthly liabilities are required to pay quarter-monthly. The State of Illinois has both a mandatory and a voluntary EFT (electronic funds transfer) program that allows both debt method and credit method transfers. Taxpayers must receive prior approval to participate in the voluntary program. Prompt payment discounts are allowed when a return is filed and the tax is paid on time. The retailer is entitled to a discount equal to 1.75% of the tax due. See 86 Ill. Adm. Code 130.501(f)(4). Direct payment permits are not currently permissible in Illinois. However, Illinois is currently undertaking a direct pay permit pilot program. A report is due to the Illinois General Assembly on the results of the pilot program on or before January 1, 2001. This report is required to include a recommendation as to whether a direct pay permit program should be implemented in Illinois. See P.A. 90-682, which enacted the Direct Pay Permit Implementation Act.

Regarding Question 5: The statutory time limit for assessing sales tax in Illinois is found in Sections 4 and 5 of the Retailers' Occupation Tax Act which set out the limitations periods for issuance of Notices of Tax Liability to retailers. See 35 ILCS 120/4 and 120/5. Section 12 of the Use Tax Act incorporates certain Sections of the Retailers' Occupation Tax Act, including the limitations provisions provided in that Act. See 35 ILCS 105/12. Please note that these limitation provisions run from the date that the tax is due rather than from the date the gross receipts are received.

The 3 to 3 1/2 year limitations period described in 86 Ill. Adm. Code 130.815, enclosed, is only for those taxpayers that have filed returns (except for fraudulent returns) for the periods in question. If the taxpayer is a non-filer for the periods in question, assessments for Retailers' Occupation Tax may be issued for periods as far back as July 1, 1981. If the taxpayer is a non-filer for the periods in question, the limitations period for Use Tax is 6 to 6 1/2 years (effective September 16, 1994). In the case of taxpayers filing fraudulent returns, no limitations period exists.

Taxpayers have 60 days after the issuance of a notice of tax liability to request an administrative hearing. A jeopardy assessment can be made relative to the sales tax. If the state receives a delinquent payment from the taxpayer, the payment is first applied to the tax, then to penalty and interest. In both non-audit and audit situations, Illinois must be notified, on Form IL 2848, that an individual will be acting on behalf of a corporate taxpayer.

Regarding Question 6: Taxpayers with a monthly average tax liability of less than \$50 may file annual returns upon authorization of the Department. Taxpayers with a monthly average tax liability of less than \$200 may file quarterly returns upon authorization of the Department. All other taxpayers must file monthly returns with the Department. Inactive sellers must file a return even though no sales are made during the return period. See 86 Ill. Adm. Code 130.545.

Inactive sellers can cease filing returns after they file the businesses' final return pursuant to 86 Ill. Adm. Code 130.530.

Regarding Question 7: Please see 86 Ill. Adm. Code 700.200 through 700.230 and 700.300 enclosed for information regarding penalties and interest in Illinois.

Regarding Question 8: If taxpayers pay amounts of taxes under the Retailers' Occupation Tax Act that are not due, either as a result of a mistake of fact or an error of law, the taxpayers may file claims for credit with the Department using Form ST-1-X. No credit shall be given the taxpayers unless they show that they have borne the burden of the tax or have unconditionally repaid the amount of the tax to the vendees from whom it was collected. See the enclosed copy of 86 Ill. Adm. Code 130.1501. The claims for credit must be prepared and filed upon forms provided by the Department containing the information listed in Section 130.1501(b). Taxpayers should not make adjustments on their next return or amend the return for the period in which the overpayment occurred.

The statute of limitations for filing claims for credit is described in Section 130.1501(a)(4). The language is somewhat confusing but, boiled down, it means that the statute of limitations is 3 to 3 1/2 years and expires in 6 month blocks. For example, on July 1, 1998, the statute of limitations expired for claims to recover taxes that were erroneously paid in the first 6 months of 1995.

Regarding Question 9: If sellers make no taxable sales (i.e., all sales are sales for resale), those sellers need not register or file returns. Sellers who make no taxable sales can apply for resale numbers that do not require the filing of returns but give the wherewithal to provide suppliers with valid certificates of resale. See 86 Ill. Adm. Code 130.1415.

Whether retailers' contact with Illinois results in nexus depends on whether the retailers are Illinois retailers, retailers maintaining places of business in Illinois, or simply out-of-State retailers. An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong

is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

If businesses register with Illinois as retailers, they are required to file returns for every return period. See 86 Ill. Adm. Code 130.545.

Regarding Questions 10 and 11: Please see, 2 Ill. Adm. Code Part 1200 for information regarding private letter rulings and general information letters.

Regarding Question 12: Divisional corporate entities may receive separate registration numbers and if they do, must then file returns separately.

Regarding Question 13: Illinois provides a credit against Illinois Use Tax liability for sales taxes properly paid and due to another state. See 150.310(a)(3).

Regarding Question 14: Illinois allows the use of blanket sales and use tax exemption certificates. A Certificate of Resale that does not contain the purchaser's Illinois registration or resale number valid on the date the certificate was issued creates a rebuttable presumption that the sale was not for resale. Taxpayers must update the certificate every three years. Please see 86 Ill. Adm. Code 130.1405 for information regarding the requirements of such certificates.

Regarding Question 15: Drop Shipments. A drop-shipment situation is one in which out-of-State purchasers (Purchasers) make purchases for resale from companies (Companies) which are registered with Illinois and have those Companies drop-ship the property to Purchasers' customers (Customers) located in Illinois. For this discussion, it is assumed that Purchasers are out-of-State companies that are not registered with the State of Illinois and do not have sufficient nexus with Illinois to require them to collect Illinois Use Tax.

As sellers required to collect Illinois tax, Companies must either charge tax or document exemptions when they make deliveries in Illinois. In order to

document the fact that their sales to Purchasers are sales for resale, Companies are obligated by Illinois to obtain valid Certificates of Resale from Purchasers. See the enclosed copy of 86 Ill. Adm. Code 130.1405. Certificates of Resale must contain the following items of information.

1. A statement from the purchaser that items are being purchased for resale;
2. Seller's name and address;
3. Purchaser's name and address;
4. A description of the items being purchased for resale;
5. Purchaser's signature and date of signing;
6. Purchaser's registration number with the Illinois Department of Revenue; purchaser's resale number issued by the Illinois Department of Revenue; or, a statement that the purchaser is an out-of-State purchaser who will sell only to purchasers located outside the State of Illinois.

If Purchasers have no nexus with Illinois, it is unlikely that Purchasers would be registered with Illinois. If that is the case, and if Purchasers have no contact with Illinois which would require them to be registered as out-of-State Use Tax collectors for Illinois, then Purchasers could obtain resale numbers which would provide them the wherewithal to supply required numbers to Companies in conjunction with Certificates of Resale. We hope the following descriptions of out-of-State sellers required to register, either as Illinois retailers or as out-of-State Use Tax collectors and persons who qualify for resale numbers will be useful.

Assuming a delivery in Illinois, Illinois retailers are anyone who either accepts purchase orders in Illinois or who sells items of tangible personal property which are located in Illinois at the time of sale. See the enclosed copy of 86 Ill. Adm. Code 130.605(a).

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see 86 Ill. Adm. Code 150.201(i), enclosed) must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code 150.801(c), enclosed. Please note that out-of-State sellers with any kind of agent in Illinois (not just sales or lease agents) are required to register as out-of-State Use Tax collectors. If companies have no contact with Illinois, they do not fall within the definition of "retailer maintaining a place of business in this State," and they need not register as out-of-State Use Tax collectors.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's sales

tax laws. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due Process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Id.* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items that will be resold. So long as Purchasers do not act as Illinois retailers and, so long as they do not fall under the definition of a "retailer maintaining a place of business in this State", their sales to Illinois customers are not subject to Illinois Retailers' Occupation Tax liability and they cannot be required to act as Use Tax collectors. So long as this is true, Purchasers qualify for resale numbers that do not require the filing of tax returns with the Illinois Department of Revenue. See 86 Ill. Adm. Code 130.1415.

Please note that the fact that Purchasers may not be required to act as Use Tax collectors for Illinois does not relieve their Customers of Use Tax liability. Therefore, if Purchasers do not collect Illinois Use Tax from their Customers, the Customers would have to pay their tax liability directly to the Illinois Department of Revenue.

While active registration or resale numbers on Certificates of Resale are still preferred, the Illinois Retailers' Occupation Tax Act provides as follows:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale." 35 ILCS 120/2c.

Again, including registration or resale numbers from Purchasers on Certificates of Resale is the preferred method for documenting that their purchases from Companies are purchases for resale. However, in light of this statutory language, certifications from Purchasers on Certificates of Resale in lieu of resale numbers which describe the drop-shipment situation and the fact that Purchasers have no contact with Illinois which would require them to be registered and that they choose not to obtain Illinois resale numbers would constitute evidence that this particular sale is a sale for resale despite the fact that no registration number or resale number is provided. The risk run by Companies in accepting such a certification and the risk run by Purchasers in providing such a certification is that an Illinois auditor is much more likely to

go behind a Certificate of Resale which does not contain a valid resale number and require that more information be provided by Companies as evidence that the particular sale was, in fact, a sale for resale.

Regarding Question 16: Nexus. For discussion on nexus please see the answer to Question 9 above.

Regarding Question 17: The State of Illinois can use statistical sampling in arriving at an audit assessment even where records exist that are adequate to perform a detailed audit. Taxpayers do not have to consent to the use of statistical sampling. Illinois generally does not assess taxpayers for costs incurred in conducting out-of-State audits.

Regarding Question 18: Illinois does not have a nexus questionnaire or a "nexus team".

Regarding Question 19: Please see the discussion on nexus in Question 9 above and 86 Ill. Adm. Code 150.201(1).

Regarding Question 20: For your information, we have enclosed a copy of 86 Ill. Adm. Code 270.115 which is the regulation regarding Jurisdictional Questions related to the Home Rule Municipal Retailers' Occupation Tax. As you will note, it is the Department's opinion that the sellers' acceptance of the purchase orders or other contracting action in the making of sales contracts is the most important single factor in the occupation of selling. If purchase orders are accepted at the sellers' place of business within the municipality, the sale is at retail, and the purchasers receive physical possession of the property in Illinois, the sellers incur Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality.

If purchase orders are accepted outside this State, but the tangible personal property which is sold is in an inventory of the retailers located within a Home Rule municipality at the time of its sale, or is subsequently produced in the Home Rule municipality, then delivered to the purchasers in Illinois, the place where the property was located at the time of the sale, or at the time it was subsequently produced, will determine where the seller is engaged in business for Home Rule Municipal Retailers' Occupation Tax purposes regarding that sale. When the purchase orders are not accepted in Illinois, nor is the property located in Illinois at the time of the sale or when it is subsequently produced, the transactions will not be subject to Home Rule tax. The transactions will, however, be subject to Illinois Use Tax, which sellers having a physical presence in this State must collect and remit.

The Retailers' Occupation Tax and the Use Tax are based upon gross receipts. See 86 Ill. Adm. Code 130.401(a).

Regarding Question 21:

No credit or refund shall be given by the Department to a taxpayer unless the taxpayer shows that it bore the burden of the tax or unconditionally repaid

the amount of the tax to the individual from whom it was collected. See the enclosed copy of 86 Ill. Adm. Code 130.1501. Please see the answer to Question 8 above.

Sales and Use Tax Base

Regarding Questions 1 and 2: See 86 Ill. Adm. Code 130.101. All tangible personal property sold at retail in Illinois is subject to tax unless a specific exemption applies. Please see 86 Ill. Adm. Code 140.101 enclosed for information regarding Service Occupation Tax. For a complete set of Illinois Retailers' Occupation Tax and Use Tax regulations, please send \$6.50 along with a written request to the above address or access the regulations at the Department's website for no charge at www.revenue.state.il.us.

Regarding Question 3: In general, a donor who purchases tangible personal property and gives it away in Illinois makes a taxable use of the property when making the gift. See 86 Ill. Adm. Code 150.305(c), enclosed. When such a gift is made, donees incur no Use Tax liability, even if they then give the item to a third person.

Please be advised these principles also apply when the donor is a business that manufactures the tangible personal property. In that situation, the donor/manufacture incurs Illinois Use Tax liability based on its cost of materials used to manufacture the tangible personal property.

Note that the Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. The tax is measured by the seller's gross receipts from such sales made in the course of such business. See the enclosed copy of 86 Ill. Adm. Code 130.101. The term "gross receipts" means all the consideration actually received by the seller, except traded-in tangible personal property. See the enclosed copy of 86 Ill. Adm. Code 130.401.

Regarding Question 4: For information on whether taxes are included in the amount subject to tax, please see Sections 130.435 and 130.445. For information on carrying charges and retailer's own coupons, see Section 130.420. For information regarding coupons and discounts, see Section 130.2125. For information on delivery/shipping charges, see Section 130.415. For information regarding installation charges see Section 130.450. Section 130.410 provides information regarding labor, service and personnel training costs. Section 130.401 provides information regarding trade-in allowances.

Regarding Question 5: Please see the following regulatory sections for information on the following: production machinery - Section 130.330; pollution control equipment - Section 130.335; agricultural equipment - Section 130.305; Direct materials, consumed or not consumed in producing the final product - Section 130.210; packaging - Section 130.2070; isolated and casual sales - Section 130.110.

Regarding Question 6: Please see Section 130.330(c)(2) which states that machinery and equipment used for in-house manufacture of exempt machinery and equipment is exempt. Note that the machinery must be used primarily in the manufacturing or assembling of tangible personal property for sale or lease in order to qualify.

Regarding Question 7: Illinois Retailers' Occupation Tax and Use Tax are imposed upon the sale at retail of tangible personal property, unless an exemption exists. If tangible personal property is not transferred, there is no tax liability.

Regarding Question 8: Please find enclosed a copy of 86 Ill. Adm. Code 130.1935, "Computer Software," which governs the taxability of computer software and software license agreements. As you can see from the regulation, the sale of canned computer software is a taxable retail sale. The sale of custom computer programs or software that is prepared to the special order of the customer is not taxable.

Regarding Question 9: The Internet and World-Wide Web. Retailers' Occupation Tax and Use Tax only apply to the transfer of tangible personal property. If no tangible personal property is transferred, no tax liability is incurred. Telecommunications Excise Tax may apply however. Please see discussion under Question 9 in the Compliance and Administration part of this response for information on nexus in Illinois. In regards to the Internet access, please note that the Telecommunications Excise Tax Act imposes a tax on the act or privilege of originating or receiving intrastate or interstate telecommunications by persons in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers by such persons, 35 ILCS 630/3 and 4. The Act defines gross charges as including amounts paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by retailers, 35 ILCS 630/2(a).

The taxability of charges for Internet access or usage is fact specific. Section 2(c) of the Telecommunications Excise Tax Act defines "telecommunications" and states that this term does not include "value added services in which computer processing applications are used to act on the form, content, code and protocol of the information for purposes other than transmission." For example, the charges for computer data, protocol conversions which permit computers to exchange data, no matter which languages or protocols a computer's output may be in, and packet-switching, which groups data into packets for efficiency of transmission, would be exempt. See 86 Ill. Adm. Code 495.100(d).

Persons that provide customers access to the Internet and who do not, as part of that service, charge customers for the line or other transmission charges which are used to obtain access to the Internet, are not considered to be telecommunications retailers for providing such access. However, if Internet Service Providers (ISPs) charge customers fees for line charges, such fees will be subject to the tax and providers will have to register as telecommunications

retailers. If retailers charge for the transmission of data, as well as for the data itself, Section 495.100(c) of the Telecommunications Excise Tax regulations provides that charges for the data processing or inquiry would not be subject to tax, but charges for transmission of the data would be taxable, so long as the charges for each is disaggregated and separately identified in the books and records of the retailer. If these charges for transmission and data services are not thus disaggregated, the entire charge is taxable as a sale of telecommunications.

Regarding Question 10: Please see Section 130.1935 regarding sales of software and associated transactions. Note that if no tangible personal property is transferred in the sale of service, no tax liability is incurred. Some of the services listed may be subject to either Retailers' Occupation Tax or Service Occupation Tax depending upon the nature of the transaction. We cannot provide more guidance due to the limited amount of information provided.

Regarding Question 11: **Taxation of Master Copies.** When persons produce and assemble master tapes for sale, they will be subject to the Retailers' Occupation Tax if the tapes are of a stock or standard nature, as would be the case with mass-produced commercial videos, or videos which, although produced according to prescribed specifications, may be sold to the public. When a special order or custom video is produced, Service Occupation Tax will be due upon sale. If the tapes are produced for the exclusive use of a particular customer and hold no utility to another party, they will be considered custom. Therefore, they will be subject to Service Occupation Tax instead of Retailers' Occupation Tax. However, please note that if 50 or more duplicates of a custom produced tape are created, the Retailers' Occupation Tax will apply. See Section 130.2115(4).

Regarding Question 12: **Sales Taxation of Maintenance Contracts.** Section 140.301(b)(3) details how maintenance contracts are taxed. Maintenance agreements are not generally taxed. Instead, the seller of the maintenance agreement incurs Use Tax on the cost price of the tangible personal property transferred incident to completion of the maintenance agreement. However, in some instances, maintenance agreements are taxable. If the maintenance agreement provides for updates of canned software, and those upgrades are not separately stated and taxed, the entire maintenance agreement is taxable as a sale of canned software.

Regarding Question 13: Except for automobiles leased under terms of one year or less, which are subject to the Automobile Renting Occupation and Use Tax found at 35 ILCS 155/1 et seq., (see also, 86 Ill. Adm. Code 130.2011 and 130.2012 which govern leases to hospitals and the government) please note that the State of Illinois taxes leases differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. For Illinois sales tax purposes, there are two types of leasing situations: true leases and conditional sales.

A true lease generally has no buy out provision at the close of the lease. If a buy out provision does exist, it must be a fair market value buy out option in order to maintain the character of the true lease. Lessors of tangible

personal property under true leases in Illinois are deemed end users of the property to be leased. See the enclosed copy of 86 Ill. Adm. Code 130.220. As end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax liability.

As stated above, in the case of a true lease, the lessors of the property being used in Illinois would be the parties with Use Tax obligations. The lessors would either pay their suppliers, if their suppliers were registered to collect Use Tax, or would self-assess and remit the tax to the Department. If the lessors already paid taxes in another state with respect to the acquisition of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. See 86 Ill. Adm. Code 150.310(a)(3) enclosed.

Under Illinois law, lessors may not "pass through" their tax obligation on to the lessees as taxes. However, lessors and lessees may make private contractual arrangements for a reimbursement of the tax to be paid by the lessees. If lessors and lessees have made private agreements where lessees agree to reimburse lessors for the amount of the tax paid, then lessees are obligated to fulfill the terms of the private contractual agreements.

A conditional sale is usually characterized by a nominal or one dollar purchase option at the close of the lease term. Stated otherwise, if lessors are guaranteed at the time of the lease that the leased property will be sold, this transaction is considered to be a conditional sale at the outset of the transaction, thus making all receipts subject to Retailers' Occupation Tax.

Regarding Question 14: The donation of tangible personal property to a charity, or to anyone else, is not considered to be a transfer for consideration, and does not result in a Retailers' Occupation Tax liability to the donor. However, donors, including those making donations to charities, incur a Use Tax liability based on their cost price of the items donated. A transfer of non-inventory property could possibly trigger a Use Tax liability if the donor of the property had not already paid tax. See 86 Ill. Adm. Code 150.305(c). Please note that special rules apply to donations for disaster relief. See 130.120(ii).

Regarding Question 15: In Illinois, construction contractors are deemed to be the users of the tangible personal property they purchase for physical incorporation into real estate. For that reason, they incur a Use Tax liability on their cost price of those building materials. See 130.2075(a)(2)

Construction contractors incur no sales tax liability on their receipts from labor furnished in the performance of construction contracts. See 130.1940(c)

Contractors can purchase building materials tax-free when those materials will be incorporated into real estate owned by an entity which has been issued an Illinois sales tax exemption identification number. See 130.2075(d). The purchasing contractor must give suppliers the certification described at 130.2075(d)(4).

Regarding Question 16: So long as the construction contractor incorporates tangible personal property into real property under a construction contract agreement, the contractor is not responsible for Retailers' Occupation Tax. In this situation, no gross receipts tax is imposed in addition to the contractors' Use Tax liability.

Regarding Question 17: A contractor that is incorporating tangible personal property into real property under a construction contract agreement would not use or accept a Certificate of Resale. See the answer to Question 15 above.

Regarding Question 18: Deregulation of Utilities Industry. Gas and electricity are not subject to the Retailers' Occupation Tax and Use Tax. Please note that gas is taxed under the Gas Revenue Tax Act (35 ILCS 615). The Department follows Illinois Attorney General Opinion 95-001 in applying the Gas Revenue Tax to interstate sales of gas for use or consumption. This opinion relies upon an Illinois Supreme Court Case, Mississippi River Fuel Corp. v. Hoffman (1955), 4 Ill 2d 459. In this case, the court held that the Gas Revenue Tax Act did not impose a tax upon the owner/operator of an interstate gas pipeline with respect to its gross receipts from sales of gas for use or consumption in Illinois.

As of August 1, 1998, due to deregulation of electric utilities in Illinois, electricity will be taxed under the Electricity Excise Tax Law (35 ILCS 640). The legal incidence of this tax is upon the consumer. The last delivering supplier collects this tax.

Regarding Question 19: Prepaid Phone Cards (PPCs). The Telecommunications Excise Tax is imposed upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers. Please see the copy of 86 Ill. Adm. Code Part 495, enclosed.

Sales of telephone cards by retailers are not subject to Retailers' Occupation Tax. However, the Telecommunications Excise Tax consequences from sales of cards by retailers may vary depending upon whether we would deem the retail stores to be retailers of telecommunications.

In some cases, retail stores purchase telephone cards from telephone service providers and then sell the cards to customers at marked-up prices. In this scenario, we do not consider the retail stores to be retailers of telecommunications. In that case, the retail store is not responsible for collecting Telecommunications Excise Tax at the point of sale of the card to its customer or at any other point. The tax is incurred at the time the telecommunications originate or are received in a taxable manner, and the amount of telecommunications charges for which the cards are redeemed by the telephone service providers would include any amount of Telecommunications Excise Tax incurred. The telephone service providers charge the phone calls and the tax against the balance of the cards as they are responsible for collecting and remitting the tax.

However, in other cases, the stores may purchase telecommunications units from telephone service providers and sell them at retail to their customers. This situation is similar to hotels that sell telecommunications services. See section 495.110. In these cases the retail stores would be required to register as telecommunications retailers and collect and remit Telecommunications Excise Tax. The tax base would be the amounts charged to card purchasers for the taxable services subsequently provided (i.e. calls that originate or terminate in Illinois). In these situations, retail stores have the burden to establish that charges are exempt from the Telecommunications Excise Tax. The only way to document this would be through records of the telephone service providers. Therefore, as a practical matter, because retail stores will not know when sales are made what taxable services cardholders will later consume, retail stores should charge the tax on the full sales prices of the cards.

Regarding Question 20: **Electronic Data Interchange.** Illinois sales tax rules provide that taxpayers may utilize electronic data interchange (EDI) as a method for record keeping if the EDI process contains the level of record detail, in combination with other records related to the transaction, that is equivalent to the level of detail contained in an acceptable paper record. See the enclosed copy of 130.805. Please note that hard copy records generated at the time of the transaction need not be retained unless those hard copy records are required to be provided or received under current Illinois statutes or rules. See subsection (d) of Section 130.805. Illinois statutes and rules do not currently provide for record keeping using Evaluated Receipts Systems (ERS). Illinois has incorporated, with minor modifications, the model record keeping and retention regulation into its current record keeping rules.

Regarding Question 21: **Procurement Cards.** The Department has no specific rules regarding procurement cards. The following information discusses when a sale is deemed to be made for jurisdictional purposes and applies to all sales in Illinois. For your information, we have enclosed a copy of 86 Ill. Adm. Code 270.115 which is the regulation regarding Jurisdictional Questions related to the Home Rule Municipal Retailers' Occupation Tax. As you will note, it is the Department's opinion that the sellers' acceptance of the purchase orders or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If purchase orders are accepted at the sellers' place of business within the municipality, the sale is at retail, and the purchasers receive physical possession of the property in Illinois, the sellers incur Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality.

If purchase orders are accepted outside this State, but the tangible personal property which is sold is in an inventory of the retailers located within a Home Rule municipality at the time of its sale, or is subsequently produced in the Home Rule municipality, then delivered to the purchasers in Illinois, the place where the property was located at the time of the sale, or at the time it was subsequently produced, will determine where the seller is engaged in business for Home Rule Municipal Retailers' Occupation Tax purposes regarding that sale.

When the purchase orders are not accepted in Illinois, nor is the property located in Illinois at the time of the sale or when it is subsequently produced, the transactions will not be subject to Home Rule tax. The transactions will, however, be subject to Illinois Use Tax, which sellers having a physical presence in this State must collect and remit.

For audit purposes, the Department looks for the same level of detail from procurement card statements that is contained in a traditional paper invoice.

Regarding Question 22: Sales/Use Tax Filing Requirements Single-Member LLCs. Every person engaged in making retail sales in Illinois must register and obtain a Certificate of Registration from the Department. See the enclosed copy of 86 Ill. Adm. Code 130.701. Each taxpayer is registered with an individual Illinois Business Tax number (IBT number) for sales and use tax reporting.

The Illinois Retailers' Occupation Tax Act defines a "person" as "any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, limited liability company, or a receiver, executor, trustee, guardian or other representative appointed by order of any court." 35 ILCS 120/1 (1996 State Bar Edition). Any limited liability corporation or other entity that is making retail sales subject to the Retailers' Occupation Tax Act or Use Tax Act must be separately registered with its own IBT number and must file returns under that number.

Regarding Question 23: Sales/Use Tax Filing Requirements QSSSs. See the answer to question 22 above.

Regarding Question 24: Taxation of Printers. For your general information we have enclosed a copy of 86 Ill. Adm. Code 130.325, regarding the Graphic Arts Machinery and Equipment Exemption. Under this exemption, machinery and equipment used primarily in graphic arts production may be purchased free from Retailers' Occupation Tax liability. We have also enclosed copies of 86 Ill. Adm. Code 130.1401 and 130.1405, regarding the Resale Exemption. Purchasers may make purchases without incurring Retailers' Occupation Tax if the tangible personal property is being purchased for resale and not for use or consumption.

"Graphic arts production" means printing by one or more of the common processes of printing or graphic arts production services as those processes and services are defined in Major Group 27 of the U.S. Standard Industrial Classification Manual. These types of common processes of printing include printing such as by letterpress, lithography, gravure, screen, engraving, and flexography. Print trade services such as typesetting, negative production, plate production, bookbinding, finishing, and loose-leaf binder production are examples of services which are included in the definition of graphic arts production.

Consumable supplies, such as chemicals used to clean plates and presses and film, are generally purchased for use and do not qualify for the resale exemption. It is our understanding that film, once exposed, retains the image

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permanently. While the resulting image may be used multiple times, the film is still a consumable supply.

SB1118 has currently passed both legislative houses and is awaiting action by the Governor. This bill will amend and update the graphic arts exemption by incorporating the North American Industry Classification System published by the U.S. Office of Management and Budget, 1997 edition instead of the U.S. Standard Industrial Classification Manual.

Regarding Question 25: Distribution of Catalogs and Other Promotional Materials. Retailers who solicit orders through the distribution of catalogs and other promotional materials in Illinois would incur Use Tax on those materials used in Illinois.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk

Enc.